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No. 85-1300

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HERBERT M. COLLINS, *et al.*,

Petitioners,

v.

CITY OF NORFOLK, VIRGINIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "totality of circumstances" standard of Amended Section 2 of the Voting Rights Act is the District Court's determination that black citizens of Norfolk have equal opportunity to participate in the political process and to elect representatives of their choice clearly erroneous under Rule 52(a), Fed.R.Civ.P.?

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Petitioners,

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This brief is submitted on behalf of the City of Norfolk, Virginia, the individual members of Norfolk City Council, the Norfolk Electoral Board and its individual members, all respondents herein and defendants below, in opposition to the petition of Herbert M. Collins, et al., for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the United States District Court for the Eastern District of Virginia, Norfolk Division.

STATEMENT OF THE CASE

This action filed on August 12, 1983, alleged that the provisions in the Norfolk City Charter adopted sixty-five years earlier for the at-large election of members of Norfolk City Council were violative of the 14th and 15th

Amendments of the Constitution, of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and of 42 U.S.C. §1983. A ten-day bench trial began May 21, 1984, and concluded June 5, 1984.[1] After requesting and receiving post-trial briefs, the District Court filed a 76-page memorandum opinion (60 pages of Petitioners' Appendix) which included 61 pages of detailed findings of fact considering each of the evidentiary factors set forth in the Senate Report to Amended Section 2 as well as noting other relevant factors which demonstrated that there was no statutory violation.[2]

Petitioners having omitted from their petition any reference to the voluminous evidentiary findings supporting the District Court's ultimate factual conclusion that, based upon the "totality of circumstances", black citizens in Norfolk have an equal opportunity to participate in the political process and to elect representatives of their choice, Respondents are constrained to bring a few of these findings to the Court's attention.

Although Norfolk's black citizens comprised only 24.07% of the voting age population (VAP) in 1970, and 31.48% of the VAP in 1980,[3] throughout the past decade, as the District Court found, always *two* and sometimes *three* members of Norfolk's seven member council were sitting who had received the support of a majority of black voters

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[1] Over 2,100 pages of trial transcript were taken of the testimony of 22 witnesses with depositions or testimony of 12 additional witnesses and over 590 exhibits submitted. (*See* App. 3a). (Appendix and Record references herein will conform to Petitioners'abbreviations.)

[2] (App. 26a-69a). Additionally, the District Court considered in detail Petitioners' Constitutional claims and found that the at-large electoral system in Norfolk was neither adopted nor maintained with the intent of discriminating against the black citizens of Norfolk. (*See* App. 27a-32a; 79a-80a). Petitioners did not appeal these Constitutional claims to the Court of Appeals.

[3] While total black population was 35.2% in 1980 it was but 28.3% in 1970, not "historically. . .one-third black or more" as Petitioners assert. (Pet. 3). *See* App. 26a; Ex. D-107.

in their last election. (App. 66a). From 1968 until 1984, City Council has *continuously* included one black member and since 1984, two black members. (Pretrial Stip. 46; App. 50a). During six of those years one black member has been Vice Mayor, appointed by his fellow councilmen.[4]

Petitioners make no mention whatsoever of the crucial role that the Concerned Citizens of Norfolk ("CCN") have played in Norfolk politics, a role which was discussed in detail by the District Court and noted by the Court of Appeals. As found by the District Court, the CCN "has become the most influential black political organization in Norfolk" (App. 64a), and as noted by the Court of Appeals, it "wields considerable clout." (App. 6a). Petitioners admitted at trial the CCN's endorsement is "tantamount to considerable black support."[5]

The importance of CCN endorsement is reflected in the black votes for the candidates it endorses. Since 1974, no black candidate for City Council has won a *majority* of the votes in homogeneous *black* precincts without CCN endorsement, and yet with such endorsement *both black*

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[4] (App. 50a). In addition to now eighteen years of continuous black membership on Norfolk City Council, one black citizen served continuously on Norfolk's seven member delegation to the Virginia House of Delegates from 1969 until 1983, Dr. William P. Robinson, Sr., and William P. Robinson, Jr. In 1983, Robert Washington did not seek reelection from the 89th District and Yvonne Miller, a black citizen, then unopposed, became the second black member on Norfolk's five member House delegation. In 1981, David Mapp, a black citizen, was elected at-large to the office of Sheriff, a constitutional office, defeating three white challengers. (App. 51a-52a).

[5] *See* Tr. 168-169. Founded in 1960 by Dr. William P. Robinson, Sr. and by Joseph A. Jordan, Jr., who served on Norfolk City Council from 1968 until 1977 when he left council to assume a judgeship, it was led at the time of the trial by William P. Robinson, Jr., and by Mrs. Evelyn T. Butts. (App. 64a).

and white candidates have routinely done so.[6] The influence of the CCN is also found in its success rate. From 1970 to the present, the City Council has always included at least *two* members, and sometimes *three* members, who were elected with the support of CCN (Pretrial Stip. 56; App. 66a). As the Court of Appeals noted, from 1972 through 1984, CCN has endorsed 21 candidates, both black and white, for City Council; thirteen (62%) have been elected, of whom five were black and eight white, despite the fact that black citizens comprised at most 31.48% of the VAP.[7]

Not only have Norfolk's black citizens exercised enormous influence in City Council politics through CCN but as individual voters they have outperformed white voters on the two measures recognized by political scientists, including Petitioners' experts (Tr. 706; 969), as key determinants of political participation, registration and turnout. Using Petitioners' own statistics, the Court found that black registration and turnout rates *exceed* those for white citizens, white registration being at 53.1% and black reg-

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[6] For instance, the District Court noted in its opinion that in 1974 CCN endorsed two white candidates--Elizabeth Howell and Claude Staylor—and one black candidate, Lenious Bond for council. Three other black candidates including Petitioner Milton Reid were running without CCN endorsement in a total field of 21, (App. 64a-65a). Without CCN endorsement, Dr. Reid received votes from only 36.4% of the voters in homogenous *black* precincts compared to Mr. Staylor and Mrs. Howell who each received over 56% and Mr. Bond who received 73.4%. (Ex. D-470F). The same pattern occurred in the 1980, 1982 and 1984 City Council elections, as the District Court found (App. 65a-66a) and in the 1982 House of Delegates race. (Tr. 180-181; 1705-1707). Four of the seven individual Petitioners and their co-counsel herein, Mr. Gay, ran for public office *without* CCN endorsement and *none received the support of a majority of the voters in homogeneous black precincts* in those elections. (App. 40a; Ex. D-470).

[7] App. 6a. Six of the seven present members of council were endorsed by CCN in at least one of their campaigns. (App. 66a).

istration at 55.3%.[8] Again, using Petitioners' own figures, black turnout rates by homogeneous precinct analysis *exceeded* white turnout rates in the City Council elections in 1980, 1982 and 1984,[9] with the black turnout rate *exceeding* the white turnout rate in 1984 by 11 percentage points.[10]

Norfolk does *not* have numbered post, majority vote or anti-single shot electoral mechanisms, all of which tend to create head-to-head contests and thus render more difficult the election of a minority candidate. Norfolk has a simple plurality-win system in which voters may vote for any number of seats from a typically large field of candidates. (Pretrial Stip. 52). The District Court found that in every City Council election from 1968 to the present the percent of the vote received by the candidate with the lowest winning total has been *less* than 50% and in four of the elections it has been below 45%. (App. 42a). Under this system, therefore, a black candidate does not need substantial white cross-over votes to reach the threshold of victory. (Tr. 1954).

In 1982 when 89.7% of total white *votes* cast were divided among ten white candidates (Pet. 3), 31.1% of all white *voters* crossed over to vote for Reverend Joseph

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[8] Petitioners' figures excluded the population on Norfolk's Naval bases and ships home ported in Norfolk despite the fact that they are included in the population by the Bureau of Census and by the State for legislative redistricting. *See Davis* v. *Mann*, 377 U.S. 678, 691 (1964). As the Court of Appeals noted, "[h]ad they been included, the statistics would have been even more striking as to black predominance" (App. 6a) with a white registration rate of 37% and a black rate of 57%. (App. 34a).

[9] Ex.P-50b; P-215. Under Petitioners' regression analysis the black turnout rate was higher in 1982 and 1984. *Id.* Far from being "episodic" (Pet. 12), under one alternative analysis performed by Petitioners' experts, black turnout rates exceeded white turnout rates as early as 1976. (Ex. D-103; Tr. 705).

[10] (App. 34a). Further, as the District Court noted, Norfolk's black citizens have been active in party politics. (App. 66a).

Green as one of their four choices and as many as 49% of white *voters* may have crossed over to vote for all black candidates. (Ex. D-474). In 1984, as many as 57% of all white voters may have voted for black candidates and 63% of all black voters may have voted for white candidates. *Id.* As Petitioners' experts admitted and as the District Court recognized (Tr. 846; App. 40a), *none* of the three winning candidates in 1984 (one black, two white) would have been elected without the support received from both black and white voters. The District Court also found a high correlation between incumbency and election to Norfolk City Council. From 1968 through 1984, the incumbency success rate was 79% with every black incumbent who has sought reelection being reelected. (App. 37a).

The evidence disclosed that the white members of City Council have generally run alone and not on a ticket with other candidates. They often were endorsed by black organizations such as CCN.[11] In 1984, the overlapping tickets were biracial and demonstrated coalition or consensus politics. Evelyn Butts (black), Reverend John Foster (black) and Joseph Leafe (white) were endorsed by CCN and Reverend Foster and Elizabeth Howell (white) were endorsed by the Rainbow Coalition, another black endorsement group.

The findings above comprise only a portion of the detailed findings made by the District Court from the trial record. On appeal to the United States Court of Appeals for the Fourth Circuit, Petitioners made two primary arguments: first, that the District Court judge demonstrated "bias and hostility toward plaintiffs' case" and was, therefore, prejudiced and, second, that the District Court's findings as to the Voting Rights Act were "clearly erroneous" under Rule 52(a), Fed.R.Civ.P., and that the "evidence

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[11] (Pretrial Stip. 55; Ex. P-13, p. 10, Ex. P-14, pp. 7-8; Ex. P-15, pp. 10, 13-15; Ex. P-17, pp. 6-7; Ex. D-479; Ex. D-480).

compels a finding" that there was a violation.[12] The entire appellate panel rejected Petitioners' first argument although, as to this, the dissent raised the argument that the District Court misconstrued the proviso to Section 2 of the Voting Rights Act (that there is no right to proportional representation), an argument which the panel majority specifically rejected. (*See* App. 9a, n.7). As to the second argument, the panel majority reviewed the evidence and the factual issues noted in the Senate Report to be considered under Amended Section 2 and concluded that under the standards of Rule 52(a) as recently explicated by this Court in *Anderson* v. *City of Bessemer, North Carolina*, 470 U.S. ___, 84 L.Ed.2d 518 (1985), the District Court's findings were not clearly erroneous. (App. 2a-9a). The dissent argued that the District Court misapplied some of the Senate Report criteria and raised a new point not previously argued by Petitioners, namely, that the District Court applied a definition of racial polarization that reinstated the intent test discarded by Amended Section 2. (App. 13a-14a).

Based upon the comments of the dissent, particularly those concerning racial polarization, Petitioners sought a rehearing and rehearing *en banc* and the Appeals Court called for briefs from both sides. Upon reviewing these additional briefs and finding no merit to Petitioners' new arguments, the petition for rehearing and rehearing *en banc* was denied.

After a thorough analysis of the "totality of circumstances" of the Norfolk electoral system and an "intensely local appraisal"[13] of political life in Norfolk by the District Court and after two reviews by the Court of Appeals, Petitioners now seek a third review of the District Court's

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[12] Petitioners' "Statement of The Issues Presented For Review" in their brief on appeal to the Fourth Circuit is set out in the Appendix to this brief.

[13] *See White* v. *Regester*, 412 U.S. 755, 769 (1973).

opinion and a fourth review of Petitioners' evidence. They now contend that the trial court "minimized the significance of plaintiffs' proof" (Pet. 7), and attempt to turn the factual inquiries suggested by the Senate Report into legal principles.

SUMMARY OF ARGUMENT

Petitioners have failed to meet any of the criteria governing the grant of a writ of certiorari stated in Rule 17 of the Supreme Court Rules. The Court of Appeals for the Fourth Circuit did not render a decision in conflict with the decision of another federal Court of Appeals on the same matter and did not decide a federal question in a manner conflicting with decisions of this Court nor are other special and important reasons presented by Petitioners. The legislative history to Amended Section 2, the decisions of the Courts of Appeals which have considered the question and the holdings of this Court are in concurrence that the ultimate determination of whether in the "totality of circumstances" a particular voting practice or procedure results in denying minority groups equal opportunity to participate in the political process and to elect representatives of their choice is a question of *fact* subject to the "clearly erroneous" standard of Fed.R.Civ.P. Rule 52(a). The detailed opinion of the District Court considered each of the evidentiary factors suggested by the Senate Report, applying them to the specific situation *in Norfolk*, and the affirmance by the Court of Appeals was proper. Petitioners took issue in the Court of Appeals primarily with the District Court's factual conclusions but, to the extent that they argued that errors of law had been committed, Petitioners were provided two opportunities to raise such points and such arguments were properly rejected by the appellate panel. The analysis employed by the District Court and affirmed by the Court of Appeals is consistent with the decisions of this Court, other Circuits and the language and history of Amended Section 2, and no un-

resolved legal issues were raised requiring the intervention by this Court. In the final analysis, the decision rested upon a combination of facts unique to Norfolk, Virginia, which the District Court was in the best position to consider, and did so.

REASONS FOR DENYING THE WRIT

I. THE CIRCUIT COURT PROPERLY APPLIED THE "CLEARLY ERRONEOUS" STANDARD IN ITS REVIEW OF THE DISTRICT COURT OPINION

In order to garner this Court's review, Petitioners characterize the inquiry into the "totality of circumstances," under Amended Section 2 as one "involving 'mixed questions' of law and fact as to which the lower courts remain divided" (Pet. 13) and press for review under a less onerous standard than Rule 52(a) imposes. Their argument is simply incorrect.

When Congress amended Section 2 of the Voting Rights Act in 1982, it was against a background of case law which recognized the highly fact-specific nature of inquiries into the existence of political vote dilution. Based upon the language in this Court's decision in *White* v. *Regester, supra*, 412 U.S. at 769, the Act itself requires consideration of the "totality of circumstances" in each challenged jurisdiction in order to reach conclusions whether minorities have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[14] The Senate Report to Amended Section 2 lists seven "typical" and two additional "factors", but it makes clear that "there is no requirement that any particular number of factors be proved, or that

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[14] While §1973(a) sets out the legal rule, §1973(b) *is* the factual test to be applied to determine if there has been a violation of §1973(a). *See* App. 86a.

a majority of them point one way or another."[15] This Court in *White* was cognizant of the trial judge's "special vantage point" and stated that it was "not inclined to overturn these findings, representing as they do *a blend of history and an intensely local appraisal* of the design and impact of the . . . multimember district *in the light of past and present reality, political and otherwise.*" 412 U.S. at 769-70. (Emphasis added).

Prior to the amendment to Section 2, this Court made clear in *Rogers* v. *Lodge*, 458 U.S. 613 (1982), that the ultimate determination under the then prevailing standard in voting rights cases was a "pure question of fact," governed by the clearly erroneous standard of Rule 52(a) and reaffirmed this Court's traditional "reluctance to disturb" the District Court's conclusions when a Court of Appeals has affirmed them under the clearly erroneous standard.[16]

Subsequent to the passage of Amended Section 2, the Fifth Circuit (which has been instrumental in the formulation of much of the case law under the Voting Rights Act in the Courts of Appeals) noted the "intensely local appraisal" required in *White* and mindful of this Court's ruling in *Rogers*, held that the ultimate finding of discriminatory result under the Act is a finding of *fact*, not

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[15] Senate Report at 29. The *factors* in the Senate Report were derived primarily from the *facts* of *White, supra*, and the Fifth Circuit opinion in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). *See* Senate Report, at 28 n.113.

[16] As the *Rogers* decision stated,

> We are of the view that the same clearly erroneous standard applies to the trial court's finding in this case that the at-large system in Burke County is being maintained for discriminatory purposes, *as well as to the court's subsidiary findings of fact.* The Court of Appeals *did not hold any of the District Court's findings of fact* to be *clearly erroneous*, and this Court has *frequently noted its reluctance to disturb findings of fact concurred in by two lower courts.* (Emphasis added). 458 U.S. at 623.

the "mixed question of law and fact" suggested by Petitioners (Pet. 13), subject to the clearly erroneous standard of Rule 52(a).[17]

This Court's recent reversal of the Fourth Circuit in *Anderson* v. *City of Bessemer, supra*, only underscores the correctness of the Fifth Circuit's decision in *Velasquez* and the deference to be given to a District Court's ultimate conclusion that no illegal vote dilution exists.[18]

In the instant case, the District Court's detailed opinion considered not only the facts suggested by the Senate Report and weighed their relevance to the reality of *Norfolk* politics, but also considered the key role of endorsement groups such as CCN (the preeminant black group in Norfolk), participation in party politics, registration and turnout, and various political coalitions (App. 63a-66a) in analyzing the "totality of circumstances" and reaching its ultimate factual conclusion. After reviewing the record, the Court of Appeals majority found none of the District Court's determinations clearly erroneous and affirmed.

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[17] *Velasquez* v. *City of Abilene*, 725 F.2d 1017, 1021 (5th Cir. 1984), stated, "The Supreme Court has squarely held that the finding of intentional discrimination necessary in voting dilution cases under the Fourteenth Amendment . . . is factual, governed by Rule 52's clearly erroneous standard. [*Rogers* v. *Lodge*, 458 U.S. 613] We have *no doubt that the finding of discriminatory effect or result under the Voting Rights Act amendments of 1982 is also governed by the clearly erroneous standard*, and *while appellants try to argue that dilution cases involve a mixed question of law and fact not governed by the clearly erroneous standard, we cannot embrace this argument.*" (Emphasis added). *See Seastrunk* v. *Burns*, 772 F.2d 143, 151 (5th Cir. 1985). The Circuits are not in dispute on this issue and no question is presented for this Court's review.

[18] *Rawl* v. *United States*, Slip Op., No. 84-2333 (4th Cir., Dec. 4, 1985) does not support Petitioners' argument. (Pet. 14). There, Judge Murnaghan made clear he was reversing a mistake in the rule of law applied while in this case he correctly noted that the ultimate issue was one of fact. (App. 8a).

In a further attempt to avoid the standard of review mandated by Rule 52(a) for the ultimate factual conclusions under the "totality of circumstances," Petitioners divide the whole into parts, asserting that the District Court misapplied six of the Senate Report factors through erroneous definitions or "gave no weight to factors which Congress considered important." (Pet. 12). Petitioners assert that the Court of Appeals "failed to review [these] fundamental errors" and, hence, that this Court should start afresh. *Id.* Petitioners' analysis is incorrect for the simple reason that the District Court, as shown abundantly by the record, did consider the evidence in light of the Senate factors.[19]

The evidentiary factors in the Senate Report, however, are simply not immutable legal principles, as Petitioners suggest, whose presence mandates dilution or which have definitions applicable in every case. As the panel majority stated, "The lesson to be derived is that any particular aspect of the voting process need not be absolutely good or bad. Rather, the application in the particular case should control and we should eschew generalities."[20] Moreover,

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[19] *Compare* Petitioners' criticism of the District Court for failing "to credit the plaintiffs with establishing *any* of the factors," (Pet. 7-8) (emphasis in original), with Brief for The Lawyers Committee For Civil Rights Under Law and The American Jewish Committee As Amici Curiae Supporting Appellees in *Thornburg* v. *Gingles*, No. 83-1968, at 11 ("with the single exception of denial of access to a candidate slating process, *the district court found that all of the factors specified in the Senate Report existed or were present . . . In light of these findings of fact*, the district court properly concluded that the signposts for vote dilution. . .all pointed to [a violation]." (Emphasis added).

[20] (App. 5a, n5). For example, courts have applied numerous tests to determine the presence of racial polarization depending on the circumstances, *see, infra*, at 16, and, indeed, Petitioners acknowledge racially polarized voting to be an "evidentiary factor." (Pet. 16). Moreover, while Petitioners complain, for instance, that the District Court treated the existence of staggered terms and lack of residency requirements as "insignificant," (Pet. 12), the Court did so only after a careful

the suggested factual touchstones in the Senate Report cannot be viewed in isolation, as Petitioners have done, but rather must be considered within the overall political framework to resolve, as the District did, the ultimate factual inquiry.[21]

II. THE DISTRICT COURT'S ANALYSIS OF THE FACTS WAS A PROPER APPLICATION OF THE SECTION 2 "RESULTS TEST"

In this Court, Petitioners seek to cast the District Court's analysis on two factors in terms of an "intent" concept alleged to be inconsistent with the language or legislative history of Amended Section 2 and to discern other "incorrect legal standards" applied by the District Court. These same arguments, although ancillary to Petitioners' main theories below, were considered by the Court of Appeals and properly rejected.

A. The District Court's Analysis of Racially Polarized Voting Is Fully Supported By The Authorities

During the trial of this action, experts for both parties offered political science tools to measure whether City Council elections in Norfolk were racially polarized with differing application and results. Petitioners' expert Dr. Engstrom offered a test that would find racial polarization wherever one racial group votes contrary to the majority of another racial group. (App. 35a). As the District Court found and as Dr. Engstrom admitted, under this overly broad definition most of the elections in this country would be racially polarized. (App. 35a; Tr. 994, 1852). More importantly, however, the District Court found that this definition "would be more appropriate in a head-to-head race than in an election such as that for the Norfolk City Council in which a voter may select more than one candidate.

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analysis of their impact *in Norfolk*, (App. 42a-43a; 71a-72a), an analysis noted by the Court of Appeals. (App. 5a n.4-5).

[21] *See* Senate Report *id.* at 29 n.118.

A vote for one candidate is not necessarily a vote against another candidate." (App. 35a).

Respondents' expert Dr. O'Rourke offered a test which the District Court found to be more applicable to the "multiple-candidate, multiple-office Norfolk City Council elections." (App. 35a). In the words of the District Court, Dr. O'Rourke suggested that three factors should be "*examined*" in order to determine whether racially polarized voting has occurred. (App. 35a; 39a).

> First, the presence or absence of "white backlash," that is, whether white voters turn out in greater numbers than usual in response to the potential election of black candidates. Second, the voting patterns of black and white voters over a period of years. Finally, whether whites attempt to limit the field of candidates. (App. 35a).

Petitioners argue that to even look at white backlash and limitations on the field of candidates is "idosyncratic," unsupported in the law and is an attempt to reinstate the intent test since it reaches voter motivation. (Pet. 16-17). Petitioners are wrong on all counts.

To begin with, the intent test eschewed by Congress in amending Section 2 of the Voting Rights Act concerned only the intent of the government officials in adopting or maintaining the electoral system, *not* the motivation of voters in choosing a candidate.[22] Whether a voter is choos-

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[22] The Senate Subcommittee Report noted: "It is irrelevant what the intent may have been of *'long dead'* legislators if the alleged discriminatory action is being *maintained wrongfully by present legislators.*" Senate Report, at 179. (Emphasis added). *See also* "Additional Views" of Senator Dole ("the motives behind the actions of officials"). *Id.* at 193. Commentators also interpreted the intent required by *Bolden* in the same light, including Petitioners' counsel of record. *See* Frank R. Parker, "The 'Results' Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard," 69 Va. L. Rev. 715, 740 (1983). ("Proving discriminatory intent *ultimately requires a determination of*

ing a candidate because of his race as opposed to incumbency or some other nondiscriminatory reason has always been an issue in results test decisions, both prior to the amendment to Section 2 and subsequently.[23] The Senate Report made clear that whether "race is the predominant determinant of political preference" must be considered.[24]

As stated in *Nevett* v. *Sides*, 571 F.2d 209, 223n.16 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980), relied upon by Petitioners (Pet. 18),

> If racially polarized voting did not exist, white candidates could not expect to retain or achieve office solely *because they were white* . . . [B]lack

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what was in the minds of legislators who enacted or retained a voting law alleged to be discriminatory. . .")(Emphasis added).

[23] As this Court noted in *United Jewish Organizations of Williamsburgh, Inc.* v. *Carey*, 430 U.S. 144, 166 (1977), the question is whether there is "voting for or against a candidate *because* of his race." (Emphasis added). This has also been the position in cases arising out of the Fifth and Eleventh Circuits. *See Jones* v. *City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) ("the inquiry is whether race or ethnicity was such a determinant of voting preference"); *U.S.* v. *Marengo Co. Comm.*, 731 F.2d 1546, 1567 (11th Cir. 1984) ("race is the main issue in Marengo Co. politics"); *Lee County Branch NAACP* v. *City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984) (quoting from *Jones* v. *City of Lubbock, supra*, at 234); *Terrazas* v. *Clements*, 581 F.Supp. 1329, 1345n.25 (N.D. Tx. 1984) ("racial bloc voting suggests that minority candidates lose precisely because of their race"); *Political Civil Voters Organization* v. *City of Terrell*, 565 F.Supp. 338, 348 (N.D. Tx. 1983) ("Racially polarized voting occurs when race is a predominant factor and influence in voter choice").

[24] The Senate Report states, at 33, "The Subcommittee Report claims that the *results test assumes 'that race is the predominant determinant of political preference.'* The Subcommittee Report notes that in many cases racial bloc voting is not *so* monolithic, and that minority voters do receive substantial support from white voters. *That statement is correct, . . . and in those communities, it should be exceedingly difficult for plaintiffs to show that they were effectively excluded from fair access to the political process under the results test.*" (Emphasis added).

candidates could not be denied office *because they were black*. (Emphasis added).

The key to determining whether voting is polarized on the basis of race is to look at all possible explanatory factors for voting patterns inasmuch as the purpose of the Voting Rights Act is, in the words of the Act, to determine if there has been a denial or abridgement of the right to vote "on account of race or color," not on the basis of political preference or some other non-racial factor. While the statistical correlation between the votes received by a candidate and the racial composition of a precinct may be considered in attempting to determine whether voting is on the basis of race,[25] those courts which have addressed the problem have not found such evidence alone to be sufficient but also have considered evidence through both expert and lay witnesses of the context of the elections in the particular jurisdictions.[26]

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[25] Despite Petitioners' suggestions to the contrary (Pet. 18), there is simply *no* one statistical methodology universally recognized as providing a threshold test above which racial polarization must be found and below which it must not, the courts using a variety of measures. *See, e.g., City of Port Arthur* v. *United States*, 517 F. Supp. 987 (D.D.C. 1981), *aff'd.*, 459 U.S. 159 (1982) (polarization score); *United States* v. *Dallas Co. Comm.*, 739 F.2d 1529 (11th Cir. 1984) (polarization index); *Major* v. *Treen*, 574 F. Supp. 325 (E.D. La. 1983) (regression analysis). The Senate Report certainly provides no hint of any such test, and the two decisions from which the Senate Report factors were derived, this Court's opinion in *White, supra*, and the Fifth Circuit opinion in *Zimmer, supra*, do not even mention polarization.

[26] *See e.g., Terrazas* v. *Clements, supra*, at 1353 ("poor financing, failure to obtain endorsements, . . . incumbency"); *Leadership Roundtable* v. *City of Little Rock*, 499 F.Supp. 579, 587 (E.D. Ark. 1980) ("name recognition, reputation, political philosophy, stand on issues"). As cautioned by Judge Higginbotham, in *Jones* v. *Lubbock, supra*, 730 F.2d at 234, in determining whether race was a determinant of voting preference, "there is a risk that a seemingly polarized voting pattern in fact is only the presence of mathematical correspondence of race to loss inevitable in such defeats of minority candidates. . . . Nor will math

To suggest that consideration of "white backlash" and "limitations on the field of candidates" as tools to determine the existence of racial voting preference is "homespun" ignores the substantial body of case law in which they have been considered, *including* the cases relied upon by Petitioners. (Pet. 16-18). For instance, in *City of Rome* v. *United States*, 472 F.Supp. 221 (D.D.C. 1979) (three-judge court) *aff'd*, 446 U.S. 156 (1980), one of the major facts considered by the District Court in its determination of the existence of racially polarized voting was the fact that a black candidate, Reverend Hill, while defeating three white challengers in a primary was defeated in the general election by a high turnout of white voters, i.e., by white backlash.[27] Other decisions have looked to limitations on the field of candidates as indicative of polarized voting.[28]

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models always furnish an answer. A healthy dose of common sense and intuitive assessment remain powerful components to this critical *factual inquiry*. For example, a token candidacy of a minority unknown outside his minority voting area may attract little non-minority support and produce a high statistical correspondence of race to loss. Yet, one on the scene may know that race played little role at all." (Emphasis added).

Judge Higginbotham's analysis was embraced recently by the Eleventh Circuit in *Lee County Branch NAACP* v. *City of Opelika*, *supra*, at 1482, and more recently in *Overton* v. *City of Austin*, Slip Op., No. A-84-CA-189 (W.D. Tx. 1985) and *McCord* v. *City of Fort Lauderdale*, 617 F. Supp. 1093, 1102 (S.D. Fla. 1985).

[27] 472 F.Supp. at 227. This Court's affirmance pointed specifically to the evidence of Reverend Hill's defeat as indicating "the presence of racial block voting." 446 U.S. at 184 n.20. *See also Major* v. *Treen*, *supra*, 574 F. Supp. at 338 ("as blacks have begun to gain access to elective office, white voters have rallied in increasing numbers to vote for candidates of their race") and *City of Petersburg* v. *United States*, 354 F.Supp. 1021, 1026 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973), cited by Petitioners.

[28] In *Perkins* v. *City of West Helena*, 675 F.2d 201, 203 (8th Cir. 1982), *aff'd mem.*, 459 U.S. 801 (1982), cited by Petitioners, the Circuit Court noted that only three black candidates had ever been elected to city council and in each case the candidate ran against two white

While Petitioners take issue with the fact that the District Court below cited only the District Court opinion in *United States* v. *Dallas County Commission*, 548 F.Supp. 875 (S.D. Ala. 1982), *rev.*, 739 F.2d 1529 (11th Cir. 1984), as authority for consideration of white backlash and limitations on the field of candidates (Pet. 18-19), those elements did not originate with that case, and the reversal by the Eleventh Circuit was not on the basis of the definition employed.[29] *Dallas County* relied upon the District Court opinion in *Bolden* v. *City of Mobile*, 423 F.Supp. 384, 388 (S.D. Ala. 1976), the decision whose reversal by this Court, 446 U.S. 55 (1980), resulted in the amendment to Section 2. The District Court in *Bolden* analyzed polarization in terms of

> white voting for white and black for black if a white is opposed to a black; or if the race is between two white candidates and one candidate is identified with sponsoring particularized black needs. *When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.* (Emphasis added).

Additionally, the District Court in *Bolden*, identified attempts by white candidates to limit the field so "as not to splinter the white vote," *id.* at 388, as well as considering statistical evidence as to voting patterns. *Id.*[30] Sim-

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candidates, but "when these black incumbents stood for reelection, each was opposed by only one white candidate, and in each instance the black was defeated." *See Taylor* v. *Haywood Co.*, 544 F.Supp. 1122, 1127 (W.D. Tenn. 1982).

[29] The Circuit Court in *Dallas County* took exception only with the District Court's conclusion, without supporting evidence, that *apathy* was the prime cause of black defeat at the polls. 739 F.2d at 1536.

[30] Certainly, this Court did not view the polarization analysis by the District Court in *Bolden* as an "intent test" because the plurality found the evidence under the "Zimmer" factors "insufficient to prove . . . a

ilarly, the District Court in the case at bar did more than simply look at "backlash" and limitations on candidates. It analyzed voting patterns and concluded (based on evidence in hundreds of pages of transcript and numerous exhibits) that "voting patterns in Norfolk City Council elections do not reflect racial polarization." (App. 36a-41a). Having the "opportunity to judge the credibility of the witnesses" for which "due regard shall be given" under Rule 52(a) (App. 87a), the District Court took issue with the failure of Petitioners' experts to consider numerous factors in their analysis which bore on the persuasiveness of their conclusions. (App. 37a-39a).[31] Certainly such findings comport with the requirements of Rule 52(a) and must be affirmed on appeal.

B. The District Court's Detailed Findings On The Issue Of Responsiveness Were Fully Supported

Notwithstanding the lesser importance of this factor in the Senate Report,[32] Petitioners made sweeping charges

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discriminatory purpose" *id.* at 73, since intent to discriminate required much more, *i.e.*, that the "disputed plan was conceived or operated as a purposeful device to further racial . . . discrimination." *See id.* at 74 n.20-21. The *Bolden* District Court analysis was also quoted in *U.S.* v. *Marengo Co. Comm.*, 469 F.Supp. 1150, 1162 (S.D.Ala. 1979) *rev. on other grds., supra* (Appellate Court noted, however, that District Court found polarized voting) and cited in *Nevett* v. *Sides, supra*, 571 F.2d at 223, n.18.

[31] While Petitioners seek to cast their experts as an "experienced analyst" and as a "national authority on minority vote dilution" (Pet. 4), the credibility of their evidence on the issue of polarization in this case was eroded, as the District Court found, by numerous methodological problems including failure to consider over 38,000 Norfolk citizens living on Naval bases and ships. (App. 37a-38a). Petitioners' experts never considered the role of incumbency nor the crucial impact of CCN and other endorsement groups on voting behavior. (Tr. 1000-1001). Dr. Engstrom (who had relied on Mr. Brace's data) put great distance between himself and Mr. Brace (Tr. 943, 945-946; 948), began his own study only two weeks before trial, and only looked at *three* elections (as compared to Respondents experts' *nine* and *excluding* 1984) (Tr. 937; 1006; Ex. P-216). Conspicuous by its absence in Petitioners' brief is any mention of Mr. Peterson whose testimony pointed out many errors in Petitioners' statistics (Tr. 491-582).

[32] The Senate Report addresses the issue of unresponsiveness in terms

of unresponsiveness and Respondents countered with overwhelming evidence of the City's responsiveness to the needs of its black citizens.[33] The District Court spent fourteen of its seventy-eight page opinion (App. 52a-62a) analyzing each of Petitioners' contentions under the requirements of Rule 52(a), some of which were noted by the panel majority, and the standards the District Court applied (App. 76a-77a) fully comport with the requirements of Amended Section 2.

Despite detailed findings of responsiveness, Petitioners seek again to avoid the "clearly erroneous" standard of Rule 52(a) by plucking out *one* comment on *one* finding by the District Court and suggesting the District Court applied an "intent test." (Pet. 20). The District Court's finding that the City's housing policies in East Ghent were not "racially motivated" responds directly to Petitioners' allegations that the City's *policies* themselves were discriminatory.[34] The Court, however, did more than find that Norfolk's housing policies were not "racially motivated" but it additionally found that the City's housing policies were responsive to the needs of Norfolk's black citizens

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of "*significant* lack of responsiveness" (emphasis added) and while "unresponsiveness is not an essential part of plaintiff's case . . . should plaintiff choose to offer evidence . . ., then the defendant could offer rebuttal evidence." Senate Report, *supra*, at 207.

[33] In terms of volume, no other issue filled as much space in the record as responsiveness. Petitioners presented approximately 90 exhibits and, once the issue was raised, Respondents had to respond with approximately 290 exhibits.

[34] (App. 60a). Additionally, the District Court found that the decision not to relocate low income families into new housing in East Ghent was due to a halt in the federal programs under which this was to be carried out and the decision was consistent with the City's efforts to revitalize the inner city tax base, an assessment approved by the Area Director for HUD. (App. 58a-61a). This same claim of intentional discrimination in housing relocation was raised by the plaintiffs in *Riddick, et al.* v. *School Board of the City of Norfolk*, No. 83-326N (E.D. Va. 1984), *aff'd*, No. 84-1815 (4th Cir. Feb. 6, 1986) and rejected.

by replacing slum housing with "decent safe and sanitary" low income housing on a one-for-one basis. (App. 59a-60a).[35] The District Court considered each of Petitioners' factual allegations and its findings, as the Court of Appeals noted, met the requirements of Rule 52(a) and certainly were not clearly erroneous.

C. The District Court Properly Analyzed The Factors

1. Slating Process.

Without offering a definition of their own, Petitioners assert that the District Court applied a "narrow definition" of a slate which caused the District Court to disregard their "considerable evidence" that an "all-white 'westside businessmen's coalition' existed which slated and promoted white candidates only." (Pet 21). To the contrary, the District Court relied on precisely the same authorities as did Petitioners for its analysis of a discriminatory slating process and its determination is fully supported by those cases which have considered the issue. *Compare* App. 72a-73a with Pet. 21.[36]

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[35] The District Court also found (1) that Norfolk's black citizens were well represented on the major boards and commissions whose members were appointed by City Council, and well represented in Norfolk's municipal work force; (2) that Norfolk's municipal departments were responsive to the needs of Norfolk's black citizens; and (3) that since 1975 Norfolk used nearly $100 million in federal grants to provide services to low and moderate income residents. (App. 53a-54a; 61a).

[36] This Court in *White* noted that only two black citizens had served from Dallas County in the Texas House of Representatives and were the only two black citizens ever slated by the DCRG, "a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County," and stated that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the [DCRG]." *Id.*, at 767 n.11. *See also Leadership Roundtable* v. *City of Little Rock, supra*, 499 F. Supp. at 589, (groups "controlling access to the ballot for positions on the Board of Directors") and *Sierra* v. *El Paso Indep. School Dist.*, 591 F.Supp. 802, 809 (W.D.Tx. 1984).

This Senate Report factor considers first whether the political subdivision has a "slating *process*" not simply whether some candidates run together on tickets and secondly whether minority groups have been denied access to that process. The evidence disclosed that in Norfolk most City Council members have run alone or with the support of CCN and not through a slating process or under the aegis of some slating organization. *See* discussion, *supra*, at 6. The Court found expressly that no group of white Norfolk citizens, including the so-called "westside business coalition", controls access to the ballot (App. 73a) and found "no evidence that any potential black candidate had ever been dissuaded from seeking election by fear of reprisals from any members of the white community." (App. 73a).

Petitioners could point to only two elections (1976 and 1980) and three candidates (Phillips, Thomas and later Leafe) as allegedly slated by the so-called "westside business coalition." (App. 44a-45a). This is far from the pervasive control noted in *White* v. *Regester* and other decisions. No matter how a slating process is defined, the District Court found specifically that "plaintiffs' theory, that this so-called 'westside businessmen's coalition' is controlling the Norfolk City Council elections, is not supported by credible evidence.[37] As noted earlier, the most

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In order to assure control, slating groups usually run candidates for each seat, a method which prevents minorities from slipping into a position by default. In *United States* v. *Marengo Co. Comm.*, *supra*, at 1569, relied upon Petitioners throughout their petition, the issue was whether there was an "informal slating process that *ensured a white candidate for every office.*" (Emphasis added). In a decision cited by the District Court as well as by Petitioners, the Fifth Circuit noted that relevant to the inquiry of the effectiveness of the slating organization is fear of black citizens to seek office because of economic reprisal. *McIntosh County NAACP* v. *City of Darien*, 605 F.2d 753, 758 (5th Cir. 1979).

[37] (App. 45a). The so-called "slates" relied upon by Petitioners were

successful of any endorsement group has been CCN whose success would not be possible in an environment where a discriminatory slating group controlled access to council. The findings of the District Court negated any suggestion of a discriminatory slating process under *any* legal test and its findings cannot under any view be clearly erroneous.

2. History of Official Discrimination.

The District Court made extensive findings as to this factor and determined that despite a past history of discrimination in Virginia, there are no lingering effects of that discrimination which prevent Norfolk's black citizens from participating in the electoral process today and that black citizens in Norfolk participate equally with white citizens.[38] Notwithstanding these findings, Petitioners argue that the District Court improperly concluded that "recent increases in black registration and turnout negated Virginia's past history of discrimination." (Pet. 22).

First of all, the District Court did *not* rely *solely* on registration and turnout figures to show no lingering effects but noted also the fact that at least one black candidate has run in every Norfolk City Council election since 1964 (and elsewhere found at least one sitting on Council continuously since 1968) and that black citizens have actively participated in the political process through the Concerned Citizens and the City Democratic Party. (App. 70a).

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certainly no barrier to effective black supported candidacies. The Phillips/Thomas ticket did not prevent Joseph Jordan's election in 1976, and in 1980, Phillips lost while Mrs. Howell who received 73% of the black vote won. (Ex. D-470).

[38] (App. 32a-35a; 69a-70a). Case law is clear that any history of past discrimination in the areas of registration, voting and political participation must be tied to lower political participation *today*. *See Kirksey* v. *City of Jackson*, 461 F.Supp. 1282, 1291 (S.D. Miss. 1978), *vacated on other grds.*, 625 F.2d 21 (5th Cir. 1980); *Zimmer* v. *McKeithen*, *supra*, at 1305; *McCarty* v. *Henson*, 749 F.2d 1134 (5th Cir. 1984) and *Chapman* v. *Nicholson*, 579 F.Supp. 1304, 1513 (N.D.Ala. 1984).

Secondly, the evidence disclosed not just "recent increases" in black turnout and registration, as Petitioners describe it (Pet. 22), but rather black registration rates *exceeding* white registration rates by two percentage points and black turnout *exceeding* white turnout by eleven percentage points using Petitioners' own numbers. (App. 34a)[39] Finally, the decisions relied upon by Petitioners to denigrate the importance of high black registration and turnout do not support their position.[40]

As the District Court found, by all well recognized measures of political participation—registration, turnout, candidacy and political parties and endorsement group ac-

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[39] Petitioners' experts admitted that turnout and registration rates were very important in measuring political participation. (Tr. 706; 969). The high turnout and registration rates for Norfolk's black citizens which exceed those for Norfolk's white citizens may be contrasted with the situation in *Thornburg* v. *Gingles*, in which the three judge court noted that the *white* registration rate exceeded the *black* registration rate by 14 percentage points. *Gingles* v. *Edminston*, 590 F. Supp. 345, 360 (E.D. N.C. 1984), appeal pending, *sub nom Thornburg* v. *Gingles*, No. 83-1968. While Petitioners' counsel ask this Court now *not* to consider the District Court's finding of high black turnout and registration in Norfolk as showing no lingering effects of official discrimination, in their amicus brief in *Thornburg* v. *Gingles* they pointed specifically to the low registration rates in North Carolina as being the result "of the long period of official state denial and chilling of black citizen's registration efforts." Lawyers' Committee Amicus Brief, at 11.

[40] For instance, in *United States* v. *Marengo County Comm.*, *supra*, 731 F.2d at 1567, the Eleventh Circuit noted that "past discrimination may cause blacks to register or vote in lower numbers than whites" while the Fifth Circuit in *United States* v. *Dallas County Comm.*, *supra*, at 1538, also noted that black turnout rate was between 5 and 10 points lower than the white rate which suggested that "somewhat lower registration rates and lower turnout rates may show that the effects of past discrimination still linger." *See also Washington* v. *Finlay*, 664 F.2d 913, 922 (4th Cir. 1981), cited by Petitioners ("though most assuredly excluded in the past . . . blacks . . . *are registered and vote . . . in proportions comparable to whites*"); and *McCord* v. *City of Fort Lauderdale*, *supra*, 617 F. Supp. at 1099.

tivity—black citizens of Norfolk are participating equally with white citizens and today there are no lingering effects of any earlier official discrimination. The Court's analysis is consistent with prior decisions and presents no issues for this Court to resolve.

3. Discriminatory Electoral Mechanisms

Petitioners point to three so-called enhancing factors—size of the election district, staggered terms and no residency requirements—all of which the District Court analyzed in detail in the context of *Norfolk's* demographics and political system.[41]

Case law indicates that the concept of unusually large election districts refers to electoral areas larger than most cities, and certainly larger than Norfolk.[42] The evidence disclosed that Norfolk is the second most densely populated city in Virginia and one of the most densely populated in the South, a compactness which facilitates access to voters and door-to-door campaigning.[43]

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[41] (App. 42a-44a). Norfolk does *not* have a majority vote requirement, anti-single shot provisions or numbered posts (App. 71a-72a), any one of which would tend to increase head-to-head contests, thus, enhancing the difficulties faced by a minority candidate. *See Gingles, supra,* 590 F. Supp. at 363; *Nevett* v. *Sides, supra,* 571 F.2d at 217n.10 (5th Cir. 1978).

[42] In *Rogers* v. *Lodge, supra,* 458 U.S. at 627, Burke County, Georgia was two-thirds the size of Rhode Island and by its "sheer geographic size" made it more difficult to get to polling places and campaign for office. In *Brown* v. *Moore,* 428 F. Supp. 1123, 1142 (S.D. Ala. 1976), *aff'd,* 575 F.2d 298 (5th Cir. 1978), *vacated on other grds.*, 446 U.S. 236 (1980), Mobile County, 1240 square miles compared to Norfolk's 53, was found to be overly large.

[43] (Tr. 1960-1961). Petitioners' reference to campaign expenditures (Pet. 24 n.12) draws no nexus between size of the district and cost of campaigning nor between cost of campaigning and likelihood of success. In fact, the evidence disclosed that good organization and important endorsements such as CCN's allowed success at the polls at lower costs. For instance, Mrs. Howell in 1980, with CCN endorsement, spent only

Staggered terms have been criticized only when found in conjunction with other enhancing devices that inhibit a minority's ability to single-shot or which create head-to-head contests.[44] Such enhancement simply has not occurred in Norfolk's plurality-win system where a large number of candidates run for several seats. (App. 42a-43a). As both the District Court and Court of Appeals recognized, black candidates have been elected to City Council in years in which the least number of seats were available.[45] Clearly, the effect of staggered terms and any other factor must be considered on a case by case basis, and the analysis of the District Court was fully supported in the record. As the District Court found, a ward residency requirement in Norfolk could act like a numbered post requirement and encourage head-to-head contests.[46] Moreover, as the evidence showed, because of residential integration a ward residency requirement would not likely increase the number of black council members. (Tr. 1957).

$8,674 and won reelection (Ex. D-70). Conoly Phillips an incumbent spent approximately $68,000 in 1980 (in association with Joseph Leafe and Vincent Thomas), yet Mrs. Butts who raised and spent approximately $18,000 (Ex. D-77) received more votes.

[44] *See City of Rome* v. *United States, supra,* 446 U.S. at 183-184; *see also Jones* v. *City of Lubbock, supra,* 727 F.2d at 383.

[45] (App. 42a-43a; 5a, n.4). Petitioners misstate Dr. O'Rourke's testimony. (Pet. 24). While Dr. O'Rourke acknowledged that in some cases staggered terms could reduce the effectiveness of black voting, this effect has *not occurred* in *Norfolk* primarily because the large field of candidates splinters the white vote and reduces the percentage needed to win. (Tr. 1958-1960).

[46] (App. 43a). There is no concensus among the Courts as to whether residency requirements strengthen or dilute black voting strength. *Compare Rogers* v. *Lodge, supra,* 458 U.S. at 627, with *City of Rome* v. *United States, supra,* 446 U.S. at 185 n.21 (residency requirement "just like numbered posts . . . separates one contest into a number of individual contests") and *Perkins* v. *City of West Helena, supra,* 675 F.2d at 212 (8th Cir. 1982). *See United States* v. *Dallas County Comm., supra,* 739 F.2d at 1537.

4. Socioeconomic Disparities

This factor in the Senate Report is framed not in terms of whether there are simply "socioeconomic disparities" as Petitioners suggest, but rather whether such disparities "hinder [a minority group's] ability to participate effectively in the political process."[47] Voter registration and turnout have been the key measures by which black political participation under this factor has been analyzed.[48] The District Court found an existing but shrinking disparity in socioeconomic conditions between Norfolk's black and white citizens, yet it also found black political participation to be equal to or greater than white participation. Because black political participation was not depressed, Petitioners obviously could not show that any such socioeconomic disparities had a hindering effect. The District Court's findings were not clearly erroneous.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT THE ELECTION OF A SECOND BLACK TO COUNCIL WAS NOT THE RESULT OF MANIPULATION BY WHITE POLITICIANS

The District Court considered Petitioners' assertion of "manipulation of the electoral process," made findings specifically on this point and its factual conclusions are

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[47] Senate Report, at 29. The footnote to this factor, *id.*, at 29 n. 114, notes that "where these conditions are shown *and where the level of black participation in politics is depressed*, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation." (Emphasis added).

[48] *See Major* v. *Treen*, *supra*, 574 F.Supp. at 351 n.31. In *United States* v. *Marengo County Comm.*, *supra*, at 1568, the Eleventh Circuit noted that "[b]lacks still register and vote in significantly lower numbers than whites" as evidence of a nexus between socioeconomic disparities and lower participation.

certainly not clearly erroneous.[49] With the burden to prove manipulation of the election, Petitioners can point only to a news clipping quotation of Mayor Thomas which they believe support their position. (Pet. 25-26). While they assert that the District Court made "no findings" with regard to the Mayor's statement, they are simply incorrect. The District Court addressed the factual issue directly and rejected it.[50] The suggestion that the Mayor's comments or those by other candidates constituted racial campaign appeals[51] was thoroughly explored and rejected by

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[49] The issue, which was hardly pressed by Petitioners below, arises from a footnote in the Senate Report, to the factor considering "the extent to which members of the minority group have been elected to public office in the jurisdiction." The Senate Report at 29 n.115, makes clear that election of a minority candidate cannot be "conclusive proof" of access since if it were it would invite attempts to circumvent the Constitution and required "an independent consideration of the record".

[50] *See* App. 50a-51a. Petitioners single out Mayor Thomas' response to a reporter that "After the election, the issue of black representation may become a moot point" (Pet. 26). They fail to mention that Mayor Thomas explained that his decision not to run for reelection in 1984 was for personal reasons (Ex. P-11, p. 43) and not to moot this case (Ex. P-11, pp. 99-101). They also fail to mention that Mayor Thomas' support for a second black member on Council predated the lawsuit (Ex. P-11, p. 99).

[51] The *only* election alleged by Petitioners at trial and on appeal to contain racial campaign appeals was in 1982. Petitioners now dispute the District Court's *findings of fact* (Pet. 26) by citing out of context comments made by the Mayor and the candidates on the School Board's plan, a plan subsequently approved by the United States District Court and affirmed on appeal, to reduce cross town busing of elementary school children. *Riddick* v. *School Board, supra.* The District Court below addressed these allegations directly finding that the issue of busing was one of legitimate public concern, was addressed reluctantly by the candidates and often only when questioned about their stance and was "not intended to . . . or in fact," used to appeal to racial prejudice. (App. 48a-50a; Ex. D-40). Moreover, the evidence disclosed no such alleged appeals were reflected in voting patterns with the percentage of white voters supporting black candidates in 1982 rising ver previous elections. (Ex.D-470). Contrary to Petitioners' claim that

the District Court (App. 48a-50a; 74a-75a) which determination was affirmed by the Court of Appeals (App. 4a) and are subject to the clearly erroneous standard.

IV. THE DISTRICT COURT DID NOT IMPERMISSABLY WEIGH REMEDIAL CONCERNS WHEN REACHING ITS CONCLUSION ON THE LIABILITY ISSUE.

In their appeal to the Fourth Circuit, Petitioners argued that the District Court was biased against them (Appendix), which argument was rejected by the entire Fourth Circuit panel (App. 9a; 12a). The dissent, however, raised the argument that the District Court confused the proviso in Amended Section 2 with the remedy of wards and thought, therefore, that the District Court's decision on liability was "foreordained." (App. 12a). This argument of the dissent was specifically addressed and properly rejected by the panel majority which noted, "Thus, the district court, in contrast to the dissent's assertion, did not conclude, as a matter of law, that ward systems would be violations of that proviso but rather merely attempted to grapple with the interplay between the appellants' desired relief and a statutory prohibition."[52]

Indeed, the District Court commented on the issue of remedy at all only (a) because Petitioners at trial *urged* the District Court to consider remedy as a part of the liability determination, over the objection of Respondents (Tr. 661-665; Ex. P-52), and (b) in response to Petitioners' experts who framed their testimony in terms of the number of "black seats" to be "created" on council under their

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Mayor Thomas displayed a "customary penchant for racial campaign appeals," the facts disclosed that Mayor Thomas supported and gave financially to Reverend Green's campaign in 1982 and supported his appointment to Council in 1977. (Ex. P-11, pp. 35, 49). Again, the District Court's findings are not clearly erroneous.

[52] App. 9a,n.7. Based on the dissent's new theory, Petitioners raised this issue in their Petition for Rehearing which after briefing by both sides was rejected again by the Court of Appeals. (App. 82a).

various ward plans relative to their percentage of the population. (*See*, e.g. Tr. 451-455; 822) Nevertheless, the District Court's detailed opinion reveals no suggestion that its ruling was based on a belief that Petitioners' ward plans ran afoul of the proviso to Amended Section 2, and the Appellate Court's resolution of this argument was correct.

CONCLUSION

The District Court made that "intensely local appraisal" expressed in *White* v. *Regester*, of *all* of the Section 2 factors in light of the "totality of circumstances." Its detailed opinion comported with the requirements of Rule 52(a) and the decisions applying Section 2. The District Court's findings had substantial support in the record and by any measurement are not clearly erroneous. The Court of Appeals for the Fourth Circuit properly assessed the District Court's decision and there are no issues as to which the granting of a writ of certiorari is appropriate. Accordingly, the Petition should be denied without awaiting resolution by this Court of the issues raised in *Thornburg* v. *Gingles*.

Respectively submitted,

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APPENDIX

APPENDIX

The following is from the Brief for Plaintiffs - Appellants filed in the United States Court of Appeals for the Fourth Circuit on October 22, 1984:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the trial judge demonstrated such a prejudgment of the case and bias and hostility toward plaintiffs' case and the relief requested that plaintiffs were denied a fair trial before an impartial tribunal.

2. Whether the District Court's findings of fact lack the independent and detailed analysis of the evidence presented which is required by Rule 52(a), Fed.R.Civ.P., when the District Court's findings fail to consider or take note of substantial contrary evidence presented by the plaintiffs, and when large portions of the District Court's findings consist of paraphrased portions of the defendants' proposed findings of fact submitted after the trial.

3. Whether the District Court failed to apply the proper legal and factual standards mandated by Section 2 of the Voting Rights Act of 1965, as amended, in rejecting plaintiffs' claims of a Section 2 violation.

4. Whether the District Court's findings (a) that at-large city council elections in Norfolk do not deny black voters equal access to the political process and an equal opportunity to elect candidates of their choice, and (b) subsidiary findings of fact made in support of this conclusory finding, are "clearly erroneous" under Rule 52(a), Fed.R.Civ.P.

5. Whether the evidence compels a finding that at-large city council elections in Norfolk result in discrimination on the basis of race in violation of Section 2 of the Voting Rights Act.